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No. 60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 36, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

LOCAL 36, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 17, 1961.

OPINIONS BELOW

The Decision of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner on which it was based, is reported as 126 N.L.R.B. No. 117. The Decision is at pp. 267-270, and the Intermediate Report at pp. 250-263, of the Record as printed for use in the court below, nine copies of which have been filed in accordance with Rule 21 of the Rules of this Court. The order of the Court of Appeals for the District of Columbia Circuit is not yet officially reported, and appears in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1961. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is it an unfair labor practice under Section 8(b)(4)(A) of the National Labor Relations Act, as it stood prior to its 1959 amendments, for a union to picket an entrance to the premises of an employer against whom it is engaged in a lawful, primary strike, when that entrance has been designated by the employer for the exclusive use of the employees of other employers who are performing work for the primary employer?

2. Is the conduct described in question 1 an unfair labor practice under Section 8(b)(4)(B) of the Act as amended?

3. If the answer to either of the above questions is in the affirmative, is the law inconsistent with the First Amendment to the Constitution in so far as it prohibits such picketing?

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 provides in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . ."

Prior to the recent amendments, Section 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (1958) provided as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or

commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; . . ."

After this case arose, Section 8(b)(4)(A) was changed to Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (Supp. I, 1959), and was amended to read as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or man-

ufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;" . . . *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; . . ."

Section 13 of the Act, 29 U.S.C. 163, provides as follows:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The First Amendment to the Constitution of the United States, provides in pertinent part as follows:

"Congress shall make no law . . . abridging freedom of speech . . ."

STATEMENT OF THE CASE

The facts of this case, as found by the Trial Examiner and approved by the Board, are undisputed. Our summary is based entirely on these findings, which are found at pages 251-256 of the Record.

Local 36, International Chemical Workers (hereinafter called the Union) is the bargaining representative of the employees of Virginia-Carolina Chemical Corporation

(hereinafter called the company) at its Nichols, Florida plant. In the Spring of 1959, the parties were negotiating the terms and conditions of a new collective bargaining agreement. The negotiations were unsuccessful, and on May 22, 1959, the union struck. In support of the strike, the union picketed all of the approaches to the company's plant.

On June 1, during the strike, the company made an agreement with Wellman-Lord Engineering, Inc., a construction company, for the installation of a "fume removal and scrubber system" at the plant premises. Shortly thereafter, the company arranged with the Allied Fence Company for the construction of an industrial fence surrounding the plant. This fence, which was completed on June 24, had four gates.

On June 12th, in anticipation of the completion of the fence, the company promulgated certain "Rules" respecting the use of the gates. Copies of these Rules were mailed to all plant employees, to the union, and to Wellman-Lord. With respect to Gate No. 3, these rules read as follows:

> "No. 3 is the gate to be used by Wellman-Lord Engineering, Inc. employees on reporting to or leaving work. A guard will be at the gate and proper identification must be shown upon entry. This gate will also be used by the employees of any other independent contractors doing work within the fenced-in area of the plant. Gate No. 3 is for the exclusive use of the employees, business visitors, and suppliers of Wellman-Lord Engineering, Inc., or other independent contractors doing work in the plant, and entry at any other gate is forbidden to the employees, business visitors, and suppliers of Wellman-Lord Engineering, Inc. or any other independent contractors doing work in the plant."

At each gate, the company placed signs identifying the number and the purpose of the gate as set forth in the Rules, and watchmen were placed at each gate with instructions to enforce the Rules.

Gate 3 was accessible only by means of a private road on the company's property which was especially built for that purpose. At the intersection of this road and the public highway the company placed a sign reading "Wellman-Lord Engineering, Inc., Employees and Visitors."

The access road was completed on or about June 11. On that date, the union placed pickets at the beginning of that road, with signs announcing "I.C.W.U. Local 36 on strike." Some of the signs also contained the words "Please Honor." "The pickets were instructed to advise all individuals approaching the turn-off to the access way that Local 36 was striking V-C and that Local 36 was requesting all such individuals to honor their picket line." (R. 254).

Both before and after the completion of the road and the beginning of the picketing, Wellman-Lord had met with representatives of the union and had requested that no picketing be conducted at that point. At one such meeting, the union had asked to examine the contract between Wellman-Lord and the company, in order to determine precisely what work Wellman-Lord would do. This request was refused, although Wellman-Lord "assured" the union that the work to be done did not include work which was "routinely" or "normally" done by the striking employees.

On June 25, Wellman-Lord's construction manager approached the access road, followed by two Wellman-Lord employees in an automobile. When they saw the pickets they stopped and spoke to them. The pickets requested the men to honor the picket line, and the two Wellman-Lord employees, both of whom were members of another union, refused to proceed further. The Trial Examiner found that "all picketing was peaceful," and that the pickets did not physically bar entrance to the accessway.

An unfair labor practice charge was filed against the union by Virginia-Carolina, alleging in substance that by picketing the accessway to Gate 3 the union had violated Section 8(b)(4)(A) of the Taft-Hartley Act. Pursuant to

Section 10(1), 29 U.S.C. § 160(1), the Regional Director for the NLRB filed an action for a preliminary injunction, which was granted on July 10, 1959. Pursuant to that injunction, picketing at the approach to Gate 3 was terminated.

Subsequently, the Regional Director issued a complaint and notice of hearing, alleging the same violation alleged in the charge. A hearing was held before Trial Examiner Ralph Winkler, who issued an Intermediate Report in which he found that the union's picketing at the access to Gate 3 violated Section 8(b)(4)(A).

His decision, in essence, was that this case was governed by the decision of the Board in *Local 761, IUE (General Elec. Co.)*, 123 N.L.R.B. 1547 (1959), enf'd 278 F. 2d 282 (D. C. Cir. 1960), *cert. granted* No. 321, October 24, 1960. The union argued that its conduct here was indistinguishable from the picketing which the Board had held lawful in *United Elec. Workers (Ryan Constr. Corp.)*, 85 N.L.R.B. 417 (1949). The Examiner agreed, but held that *Ryan* was inconsistent with *General Electric*, and concluded that "*the General Electric* decision, as the Board's later pronouncement, must therefore govern this proceeding."

The Trial Examiner rejected the union's attempts to distinguish the present case from *General Electric*. He held immaterial the fact that in this case the separate gate was established after the strike had begun, and he found that there was no evidence to support the union's contention that Wellman-Lord was performing work normally done by the strikers.

Finally, the Trial Examiner ruled that the proviso in Section 8(e) of the amended Act, 29 U.S.C. § 158(e) (Supp. I, 1959), which exempts from the protection of the secondary boycott provisions of Section 8(b)(4) a "subcontractor working on the goods or premises of the jobber or manufacturer . . ." applies only to "the apparel or clothing industry."

The union duly filed with the Board exceptions to the Trial Examiner's decision. The Board affirmed the decision of the Examiner in a short opinion, and entered an order which required the union to cease and desist and to take certain affirmative action.

The union filed a petition for review in the Court of Appeals for the District of Columbia Circuit. The case came on for hearing in that court on October 26, two days after this court had granted certiorari in *General Electric*. On November 1, 1960, the union, petitioner here, filed a motion asking the court to decide the case on the authority of its own decision in *General Electric*, rather than to hold it pending this Court's decision, so that petitioner might itself have an opportunity to be heard in this Court before the issues presented were finally decided. Pursuant to this motion, the court, on January 17, 1961, entered an order affirming the decision of the NLRB on the authority of *General Electric*.

REASONS FOR GRANTING THE WRIT

1. This case involves the same basic issue as is involved in *Local 761, IUE* v. *General Electric Co.*, No. 321, in which this Court granted certiorari on October 24. That issue is whether it is lawful for a union, in support of a legitimate primary strike, to picket the premises of the struck employer at a gate which that employer has designated for the exclusive use of other employers and their employees who are performing services for the primary employer. Since the Court has already decided to review this question, there is no need here to belabor its importance. Suffice it to say that in our view the decision of the Board and the court below in both of these cases has seriously infringed on the statutory right to strike and to engage in concerted activities, National Labor Relations Act §§ 7, 13, 29 U.S.C. §§ 157, 163, in a manner which is totally at war with established precedent and the legislative history of the statute.

Since the issue raised in this case is already pending before the Court, the real question presented on this petition is whether this case should be set down for argument and consideration along with No. 321, or whether it should be held for decision after No. 321 is decided.

It is our view, for the reasons hereinafter set forth, that the basic issue presented in both these cases can be fully considered and understood only in the light of the facts of each of the cases, and in the light of the issues raised in each. Only with both cases and all issues before it will the Court be able to deal fully and finally with the underlying problem.

Since the brief for Petitioner has already been filed in No. 321, joint consideration of both cases will be possible only if the present one is expedited. We are willing to make every effort to co-operate with the Court in meeting any schedule which it sets down. We have already filed a brief as *amicus curiae* in No. 321. We are prepared to file a brief in the present case within 10 days after a grant of certiorari, in which we will deal fully only with those issues which were not raised, and therefore not adequately briefed in our brief in No. 321, particularly the constitutional issue described below. We are also prepared to file sufficient copies of the record, as printed for use in the Court below, within that period.

We turn now to an examination of the reasons why we feel this case should be heard and considered in conjunction with No. 321.

2. One of the questions which this Court will inevitably face in the *General Electric* case is whether the "reserved gate" doctrine conflicts with the decision of this Court in *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 (1951). Review of the present case would assist the Court in its determination of that issue, since the present case is

indistinguishable from the *Rice Milling* case except for the added factor here of a reserved gate.

In *Rice Milling,* the union picketed the premises of the primary employer, and thereby induced "two men in charge of a truck of a neutral customer of the mill to refuse, in the course of their employment, to go to the mill for an order of goods." 341 U. S. at 667. This, the Court held, "did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes." 341 U. S. 670. In the present case, the union also picketed the premises of the primary employer, and also induced two employees of another employer not to cross the picket line. The only difference between this case and the *Rice Milling* case is the presence of a special gate, reserved for the employees of another employer, at which the picketing took place. Thus, this case presents in the clearest possible fashion the question whether the mere presence of a "reserved gate" converts what would otherwise be legitimate primary picketing into a secondary boycott.

This issue is presented also in *General Electric,* but not in such bold relief. The number of secondary employers and employees involved in that case is much greater than were involved in *Rice Milling* or in the present case. While we do not read the *Rice Milling* opinion as turning on the number of employees affected, the Court of Appeals in *General Electric* seemed to think that numbers were at least relevant, for it dismissed *Rice Milling* merely by saying that "this was no case of a union's seeking 'to influence two employees of a customer of the mill not to cross the picket line.'" 278 F. 2d at 286.

It is our position that Section 8(b)(4) of the Act was never intended to prohibit picketing at the primary employer's premises, even though such picketing induces employees of other employers to stay away. "It makes no difference whether 1 or 100 other employees wish to enter the prem-

ises." *United Elec. Workers (Ryan Constr. Co.)*, 85 N.L.R.B. 417, 418 (1949).

In our view, therefore, the present case must be decided the same way as *General Electric*. But only if certiorari is granted in this case can this Court have squarely before it the question of whether either the presence of a separate gate or the number of secondary employees affected is a basis for distinguishing the *Rice Milling* decision from the situations presented in these cases.

There is another factual difference between this case and *General Electric* which should also be before this Court in order for the basic issue presented in both cases to appear in proper perspective. Here, unlike in *General Electric*, the "reserved gate" was created during the strike. With the exception of *General Electric*, very few if any employers had separate gates for secondary employees prior to the Board's promulgation of the "reserved gate" doctrine. As the present case illustrates, however, employers are now finding it advantageous to create such gates. In this case, indeed, the employer built an entire fence to come within the protection of the *General Electric* decision. This case therefore presents more clearly than *General Electric* the question whether Section 8(b)(4) was designed to make it possible for an employer to avoid the impact of a primary picket line by the simple device of creating a separate gate reserved for employees of other employers.

3. There is a very important question which, although it should be considered in both this case and *General Electric*, has not been raised in the petition for certiorari in *General Electric*. That is the question of whether the Board's "reserved gate" doctrine can be sustained under the recent amendments to the National Labor Relations Act, which are now in effect.

Both of these cases were decided under Section 8(b)(4)(A) as it stood prior to the 1959 amendments. Nevertheless, the amendments are also necessarily involved, since un-

der familiar principles of equity this Court could not grant enforcement of the Board's order, which operates prospectively, unless the Court determines not only that the union's conduct was unlawful under the act as it existed at the time the conduct took place, but also that it would be unlawful under current law. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855); 7 Moore, Federal Practice ¶ 60.26[4] at p. 289 (2d ed. 1955).

The pertinent portion of the statute as amended makes it an unfair labor practice for a labor organization:

> "to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: Provided, *That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*" 29 U.S.C. § 158(b)(4)(B) (Supp. I, 1959). (Emphasis added).

There are several changes in language in this new version of the statute, but the most significant change for purposes of the present case is the addition of the proviso which is printed above in italics. This entirely new portion of the statute expressly protects picketing which is "primary" presumably even if such conduct might otherwise be deemed to fall within the broad prohibition of the other portions of the statute. Thus, if the conduct of the union in this case is to

be characterized as "primary," it would be lawful under the new statute regardless of its status under the old.

This question is not raised in the petition for certiorari in No. 321, probably because petitioner felt, as we feel, that the type of picketing involved in both of these cases was not unlawful even under the original statute. Should the Court hold otherwise, however, the decision would be of little value unless the Court could also consider whether the picketing involved in these cases would or would not be protected as "primary" under the amended statute. Only if certiorari is granted in the present case would that question be squarely before the Court.

4. The decision of the Board and the court below presents yet another serious legal issue which has not been raised in the petition in *General Electric:* whether the statute, if correctly interpreted by the Board and Court below, is inconsistent with the constitutional right of free speech. This Court has long held that picketing is a form of free speech which is protected by the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Chauffeurs Union* v. *Newell,* 356 U. S. 341 (1958), *reversing* 181 Kans. 898, 317 P. 2d 817 (1957). The constitutionality of Section 8(b)(4) was sustained by this Court in *International Bh'd of Elec. Workers* v. *NLRB,* 341 U. S. 694, 705 (1951), on the ground that it prohibits only speech which induces or encourages illegal conduct. In *General Electric* and in the present case, however, the Board has prohibited picketing which induces secondary employees to refrain from entering struck premises, despite the fact that the statute specifically preserves the right of employees not to enter the premises of an employer whose employees are engaged in a lawful primary strike.

A proviso to Section 8(b)(4), which dates from the original Taft-Hartley Act, provides that "nothing contained in Section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of

such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." The legislative history of this proviso indicates that Congress recognized that union members consider it a "strikebreaking" activity to enter struck premises of another employer, and therefore included specific language to protect the right of employees not to cross another union's primary picket line. S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947).

It would appear, therefore, that employees have the right, under the Act, to refuse to enter the premises of a struck employer, even through a separate gate. Thus, by prohibiting picketing at such a gate, the Board and the court below have prohibited a form of peaceful free speech which was designed to induce employees to exercise a right which the statute specifically grants them. This result presents a constitutional issue of first magnitude which should be decided by this Court.

CONCLUSION

For the Reasons stated, it is respectfully submitted that this petition for certiorari should be granted, and the case set down for argument with No. 321.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 15,631

LOCAL 36, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Chief Judge, and Fahy and Washington, Circuit Judges.

ORDER

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel. Thereafter on November 1, 1960, petitioner filed a motion requesting that a final order be entered disposing of this case in accordance with the rulings of this court in *Insurance Agents International Union* v. *National Labor Relations Board,* 104 U. S. App. D. C. 218, 260 F. 2d 736, and in *Local 761, International Union of Electrical, Radio and Machine Workers* v. *National Labor Relations Board,* 278 F. 2d 282. No objections to petitioner's motion have been filed.

Upon consideration whereof it is ORDERED by this court that the order of the National Labor Relations Board on review in this case shall be enforced on the authority of the above-mentioned rulings of this court, with opportunity to petitioner, if so advised, to petition for certiorari in the Supreme Court of the United States.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days serve and file a proposed enforcement decree consistent with this order.

Per Curiam.

Dated: January 17, 1961.

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JAMES R. BROWNING, Clerk

No. 680

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 36, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 680

LOCAL 36, INTERNATIONAL CHEMICAL WORKER UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This petition presents the same issue as is involved in *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board, et al.*, No. 321, certiorari granted, October 24, 1960, 364 U.S. 869. That issue is whether the Board may properly find that a union violated Section 8(b)(4)(A) of the National Labor Relations Act by picketing the premises of an employer with whom it is engaged in a labor dispute, at an entrance reserved exclusively for neutral employers and their employees who work on those

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premises in a regular manner.[1] In view of the grant of certiorari in No. 321, we do not oppose granting the present petition and setting it down for argument along with No. 321, provided it does not delay the argument in No. 321. However, it should be noted that the instant case comes from the same court of appeals as No. 321. The court did not reexamine the question but merely relied on its prior decision, and petitioner has already set forth its position in an amicus brief filed in No. 321.

Respectfully submitted.

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Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

FEBRUARY 1961.

[1] The other two issues which petitioner seeks to present (Pet. 2), are facets of this one basic issue. Thus, since the Board's order looks to the future, it will be necessary, in assessing its validity, to determine what effect, if any, the 1959 amendments to the Act have on the situation here (see Pet. Brief in No. 321, pp. 46, 73; Amici Brief in No. 321, pp. 29–36). Similarly, if the Board's order is authorized by the statute, the constitutional question would then be presented, but we submit it is insubstantial in view of *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705.

U.S. GOVERNMENT PRINTING OFFICE: 1961